LABOR POLICIES OF THE TRANSPORTATION ACT FROM THE STANDPOINT OF THE PUBLIC GROUP

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A DECISION construing several sections of Title III of the Transportation Act and determining the powers of the Railroad Labor Board has very recently been handed down by the United States District Court for the Northern District of Illinois, Judge Page, Circuit Judge, writing the opinion. As this decision is the law until modified by higher authority, it may be illuminating to examine it.

The Labor Board had, it appears, found that the Pennsylvania Railroad had not complied with one of its decisions and was about to publish its finding to that effect. The Pennsylvania then applied to Judge Landis for an injunction restraining the Board from such publication, and a temporary order was issued which the Board endeavored to get set aside. After a delay of many months, Judge Page last week rendered his decision refusing to dismiss the injunction.

The Labor Board had proceeded against the Pennsylvania as authorized by Section 313, which follows:

> Section 313. The Labor Board in case it has reason to believe that any decision of the Labor Board or of an adjustment board is violated by any carrier or employee may upon its own motion after due notice and hearing to all persons directly interested in such violation determine whether in its opinion such violation has occurred and make public its decision in such manner as it may determine.

The authority conferred by the above section on the Board to publish its finding that railroads or employees have violated its decisions is the only express sanction provided by the Act toward making these decisions effective. Were it not for the procedure set out in this section, a railroad or an organization of employees might issue false propaganda to the effect that it had obeyed the decision or that the decision did not apply to it or that the board had no jurisdiction to make such a decision,

and so befuddle the public as to the situation that public opinion could not function. Congress did not give the Board arms to enforce its decisions, but did give it a voice whereby it might charge a recalcitrant with disobedience and convict it before the bar of fair-minded men by means of the marshaling of unassailable facts.

In this particular case the injunction issued by the Court has the effect of preventing the board from informing the public as to the facts in the controversy between the Pennsylvania Railroad and its shop employees. Official information as to the facts relating to this controversy is of very great importance, at least to the students of politics in industry. It would, therefore, seem to be worth while to examine the decision in detail and to ascertain, if possible, whether it rests upon secure foundations.

In order that the decision may be understood, certain recent railroad history must be recited.

In March, 1920, a dispute was pending between practically all the railroads and all their employees as to what should constitute reasonable wage rates and reasonable working rules. Representatives of the parties had conferred but could agree on nothing. On April 16, 1920, the entire dispute was submitted by both parties to the Railroad Labor Board for decision. The Board decided the wage portion by Decision 2 of July 20, 1920, but reserved the rules portion for further consideration.

By its Decision 119 of April 14, 1921, the Board—"Called upon the officers and System Organizations of employees of each carrier parties hereto to designate and authorize representatives to confer and to decide so much of this dispute relating to rules and working conditions as it might be possible for them to decide." This Decision 119 was, then, a request made of the carriers and employees to aid the Board to arrive at a decision as to what should constitute reasonable rules and working conditions by agreeing on as many of said rules as they could.

A new dispute arose on the Pennsylvania Railroad as to the proper procedure to carry out the Board's request. Certain organizations of its employees contended that representatives should be elected in a certain manner, but the railroad com-

pany disagreed with this proposal and insisted on carrying on the election in quite a different fashion. The officers of the company and of these organizations of employees conferred on the subject but still failed to agree. Application was then made by the chief executives of the organizations of employees directly interested to the Board for its decision. The company also appeared before the Board, put in its evidence and argued in support of its position.

By its Decision No. 218, the Board decided the dispute presented by the employees' organization, which dispute had not been decided in conference, although conference had been had. By this decision the Board established rules of procedure for the election of employees' representatives on the Pennsylvania Railroad in order that the request of the Board in Decision 119 might be carried out. No question was raised by the railroad at the time as to the satisfaction of the requirements for conference imposed by another section of the act, Section 301.

Afterwards the employees' organizations informed the Board that the Pennsylvania Railroad was not obeying its Decision 218 and accordingly the Board took proceedings under Section 313 to ascertain whether the Pennsylvania had violated this decision. Apparently it determined that the railroad had done so and was about to make its finding public when it was enjoined.

Judge Page, in the opening paragraph of his opinion, thus states the case:

> This is a bill by the Pennsylvania Railroad Company against the Labor Board and its members to enjoin them from functioning as a board generally and specifically from exercising the asserted right to control the selection of the referees provided for in Section 301 of the Transportation Act.
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> Two claims were urged. (1) That the Act is unconstitutional if, and in so far as, it attempts to impose compulsory arbitration, and (2) that the Act gives the Board no right under *ex parte* submission nor under its own motion to do any act under Section 301.

This statement of the nature of the proceeding does not aptly describe it. The Board was not, as is stated, attempting to exercise the asserted right to control the election of the conferees provided for in Section 301, but was asserting the right to publish a decision finding the carrier had not obeyed its Decision 218. This decision interpreted the "call" of the Board in Decision 119. The conferees on the dispute which

No. 218 decided had duly conferred and had disagreed. The Board did not attempt to control their selection. The chief executive of one of the parties had applied to the Board for a decision of that dispute. In the controversy which Decision No. 218 decided, there was no question that the representatives of the employees in that dispute were properly authorized and designated to confer nor that they had conferred and had disagreed.

The opinion considers and apparently decides four points as follows:

(1) The Labor Board is a body corporate subject to the jurisdiction of the Federal Courts and may sue and be sued.

(2) The appointment or method of selecting referees under Section 301 was not one of the functions delegated to the Board and therefore it had not the right to make the designation provided for in Decision 218 on pages 8, 9 and 10.

(3) As to other matters than those jointly submitted to the Board under Section 301, the decisions of the Board are only advisory, but as to jointly submitted matters legally enforcible.

(4) Title III of the Transportation Act is constitutional and confers on the Labor Board the right to prescribe compulsory arbitration and to fix wages under such compulsory arbitration.

The language of the court is not altogether distinct and without ambiguity, but it is believed the above constitutes a fair statement of the decision on the points covered by the opinion.

The first point needs no particular discussion.

It is believed that the decision of the court as to the second point is erroneous. Section 301 of the Transportation Act reads as follows:

> Section 301. It shall be the duty of all carriers and their officers, employees and agents to exert every reasonable effort to adopt every available means to avoid any interruption to the operation of any carrier growing out of any dispute between the carrier and the employees or subordinate officials thereof. All such disputes shall be considered and, if possible, decided in conference between representatives designated and authorized so to confer with the carriers or the employees or subordinate officials thereof directly interested in the dispute. If any dispute is not decided in such conference, it shall be referred by the parties thereto to the Board which under the provisions of this title is authorized to hear and decide such dispute.

The relevant portions of Section 307 should also be cited:

Section 307. (a) . . . Labor Board (1) upon the application of the Chief Executive of any carrier or organization of employees . . . whose members are directly interested in the dispute, (2) . . . (3) upon the Labor Board's own motion if it is of the opinion that the dispute is likely substantially to interrupt commerce, shall receive for hearing and as soon as practicable and with due diligence decide any dispute involving grievances, rules, or working conditions which is not decided as provided in Section 301. . . . (b) The Labor Board (1) upon the application of the Chief Executive of any carrier or organization of employees . . . whose members are directly interested in the dispute (2) . . . or (3) upon the Labor Board's own motion if it is of the opinion that the dispute is likely substantially to interrupt commerce, shall receive for hearing and as soon as practicable and with due diligence decide all disputes with respect to the wages or salaries of employees . . . of carriers not decided as provided in Section 301.

It has always been the construction of the Board and of officers of carriers and of organizations of employees that Section 301 stated the duties of such officers and employees of carriers with reference to railroad labor disputes. They have never understood that Section 301 imposes any duty on the Board.

It is also the construction of the Board and of such officers that Section 307 is the section which confers jurisdiction on the Board to decide disputes as to working conditions or as to wages and prescribes the manner in which such disputes shall be presented to the Board.

It has also been the belief of the Board that it had power to decide any dispute on which conference had been had or attempted by either party, and which was presented upon the application of the Chief Executives of carriers or of organizations of employees, if the dispute involved grievances, rules, or working conditions or wages or salaries of employees.

As appears by Decision 218, the Board believes that a dispute as to whether representatives were duly designated and authorized to confer was a dispute involving grievances, rules or working conditions which it had power to decide under Section 307. It has been convinced that a dispute relating to the proper designation or authorization of representatives should be interpreted as coming within the meaning of the words "grievances, rules, or working conditions." It could not well decide whether the method adopted in the dispute was a reasonable rule without deciding what a reasonable rule would be. Section 307 (d) provides that all the decisions of the Board in respect to working conditions shall establish stand-

ards of working conditions which are just and reasonable. A method of selecting representatives to confer is a "working condition". Experience has shown that controversies as to whether persons claiming to represent a particular class do so are very frequent and of great importance in railroad operation. The right of members of organizations of railroad employees to select their representatives as they see fit and to select whom they see fit is among the most cherished rights of railroad employees. It has been the subject of many controversies. Its denial by railroad officers has been a frequent cause of conflict and of discontent. The court's decision in this respect apparently goes to the length of holding that the Board has no power to decide a dispute which concerns only the question whether particular persons claiming to represent a class really do so or to decide what is the correct and legal method of determining who are qualified representatives. This denial of power goes to the very essence of Title III. If the Court's decision in this respect is not reversed, it will destroy the efficacy of that title as means to prevent interruption of railroad operation by labor disputes.

It would appear to be clear that there can be no dispute cognizable by the Board unless the subject of dispute is adopted as such by an organization of employees or by 100 unorganized employees who are really organized for the purpose of presenting the dispute. If a carrier may decline to confer with the representatives designated by the organization according to its laws and the Board has no power to decide whether the railroad officers are under a duty to confer with the said representatives, the effective power remaining to the Board is little more than a power to collate statistics. The court by this decision, has, in my judgment, disemboweled Title III. The right of organizations of employees to select what representatives they see fit has been long acquiesced in by practically all the railroads of the United States. The Pennsylvania Railroad is the only notable exception. In the past this railroad has generally claimed the right to decide with what representatives it would confer.

The result of this decision, in effect, is to enable the officers of carriers to decide with what persons claiming to be representatives of employees it will confer. The Board according

to the court has no power to correct their decision. The decision destroys the efficacy of Section 301 as a mandate to officers and employees of carriers to confer and to decide their disputes in conference if possible. Naturally the employees can confer only by representatives. If the carrier may decide finally who are representatives of the employees, it is clear that the representatives so designated by the carrier may not be those whom the employees wish to represent them. As the representatives selected by the carriers to represent the employees may not, in fact, represent them, it is clear that the employees will not be bound by the agreements entered into by the representatives recognized only by the railroad officers. There may be conference and agreement between the conferees but the agreement will get nowhere. Railroad employees will not permit railroad officers to select their representatives.

It is respectfully urged that the court in this respect is in error. Railroad employees have a right to organize and the members of the organizations have a right to choose such representatives as they see fit and it is the duty of officers of carriers to confer with the representatives chosen by the members of the said organizations. It must be within the power of the Board to decide whether the representatives claiming to represent the members of organizations do in fact represent them, if the Board is to function.

As stated above, the fourth matter decided by the learned judge is that Title III provides for compulsory arbitration and that it is constitutional. Yet it is decided that prior to reference to the Board as arbitrators of the dispute there must be conference between representatives of the parties. It is further decided that one party may recognize whom it pleases as the representatives of the other party and that the Board may not review this decision. Therefore, the court has decided that railroad employees are required by law to confer by representatives but that the management can select their representatives; that the representatives so selected and the management may jointly refer the dispute to the Labor Board; that the representatives selected by the management to represent the men may present evidence and arguments to the Labor Board; and that when the Board has heard the representatives selected by the management to represent the management and the repre-

sentatives selected by the management to represent the men, the Board may decide the matter and the employees of the railroad concerned are bound by law to obey the decision of the Board.

Judge Pages states that the decision of the Board on disputes jointly referred by the parties is binding and may be enforced by court proceedings.

The dispute must be jointly referred by the parties. And who are the parties? The parties must be the railroad company and the organizations of employees conferring through representatives. Who is to refer the dispute? The words of Section 301 are "it shall be referred by the parties." The parties to a reference are not the representatives or delegates conferring but the persons or organizations they represent. Under Judge Page's decision it would appear that it is the representatives who must jointly refer the dispute. If the dispute is referred by the representatives of the management selected to act for the management and the "representatives" appointed by the management to act for the men, what becomes of Section 307? That is the only section conferring any power on the Board to decide disputes. It can act only upon the application of the Chief Executive of any carrier or organization of employees whose members are directly interested in the dispute unless it intervenes on its own motion because the dispute is likely to interrupt commerce substantially. As the carrier can in effect select the representatives of the employees under the court's decision, to get the matter "arbitrated" by the Board it must necessarily also select the Chief Executive of the organization of employees to refer the dispute. It would seem, therefore, that not only has the court in effect rendered organizations of employees impotent to select their own representatives to confer under Section 301 but it has also in effect authorized the management to select the Chief Executive for the organizations of employees. The court has apparently authorized the railroad companies to create organizations of employees of their own to handle rights provided and duties imposed by Title III.

The court decides, however, that the Chief Executive of an organization of employees may make application to the Board for decision of a dispute and that the Board must decide it.

In this case, however, the Board's decision is only advisory and can not be enforced by legal proceedings.

Probably the Board is also without power to look into the qualifications of the Chief Executive claiming to be such. If the Board may not decide who are qualified conferees it may not decide who are or are not "Chief Executives." Railroad employees must thus receive such wages and work under such working conditions as the Board decides are just and reasonable after hearing representatives of the management only.

Section 309 provides: "Any party to any dispute to be considered by the Labor Board shall be entitled to a hearing either in person or by counsel." As apparently under the court's decision the parties to the dispute may consist entirely of representatives satisfactory only to the management, it is only representatives of the management who are entitled to such hearing.

The opinion finds that the decision of the Board has a different effect according to whether the dispute comes before the Board by joint submission under Section 301 or by application of the Chief Executive of a party. If by the first method, the decision of the Board is binding and can be enforced by legal proceedings, if by the second method, the decision is merely advisory. If the carrier goes to the length of selecting a "Chief Executive" as well as representatives for the men, it may get a binding decision.

It is believed that this is an error; parties have only one method of getting a dispute before the Board for decision. This one method is set out in 307, viz. by application of the Chief Executive of a carrier or of an organization of employees directly interested or by application of 100 or more unorganized employees.

This provision was adopted by Congress in part to avoid the reference of trivial disputes to the Board. It was believed that the Chief Executives of the carriers and of organizations of employees would refer only matters of consequence. Congress also understood that the Chief Executives of carriers and of organizations of employees had adopted definite policies with reference to wages and working conditions and it was believed desirable to put them in a position to control reference of disputes.

The inference from the court's decision is that the parties

to the dispute are the representatives conferring. If this is the case, these representatives may apparently, under his decision, refer what they wish without reference to the Chief Executive. Thus disputes, for example, between shop foremen and employees on trivialities may be referred to the Board for decision. The effect of this will be, of course, to swamp the Board with unimportant disputes. The requirement imposed by Congress that the Chief Executive make application imposes on him the duty of weeding out matters of slight importance.

As the Board makes rules and wage rates for almost two million men and its decisions have involved hundreds of millions of dollars, it ought not to be troubled with matters which responsible officers can themselves settle.

The judge finds that the Board's decision under an application not jointly submitted by both parties to a dispute is advisory only. Decision 218 was a decision upon the application of one party, viz., the labor organization. Hence, under the judge's construction, Decision 218 was advisory only, yet he refuses to dismiss an injunction against the publication of this advisory decision. It seems remarkable that the Board may not even render its advice without doing irreparable injury to the Pennsylvania Company.

Of course, it may be that the decision is intended to restrain the Board from the expenditure of public money to publish a decision which it had no authority to make. This is not stated, but conceivably it might be rested upon that ground. The argument would be that the law gives the Board the right to decide only disputes involving grievances, rules and working conditions, whereas a dispute which relates to a question whether particular persons are in fact duly designated representatives of the parties is not a dispute involving grievances, rules and working conditions. Yet it would appear that Congress must have intended a dispute involving those subjects to be within the powers of the Board to decide. The paramount object of Congress as is shown by an examination of the entire act was to prevent interruption of operation growing out of disputes between railroads and their employees. Certainly a dispute as to who should be the representatives of employees is one which might well bring about interruption to

operation. When the tribunal created by Congress to decide disputes tending to interrupt operation is prevented from deciding one of the main subject matters of disputes, a subject matter which experience has shown is among the most passionately asserted and strongly maintained rights of workmen, the power of that tribunal to function effectively is almost fatally injured.

It would seem to be clear that Congress intended the Board to have jurisdiction over all disputes tending to interrupt operation; that a dispute as to what persons are properly recognizable by railroad management is one tending to interrupt operations; that such a dispute involves grievances, rules and working conditions; that Decision No. 218 of the Board was within this jurisdiction; that the Board had power to determine whether the Company had violated its decision and to publish its decision. It is believed, therefore, that the court should have overruled the injunction instead of continuing it.

If this line of reasoning is valid, Judge Page's decision cannot be considered a correct determination of law. It is earnestly hoped that the Board will take steps to secure a review of this decision by the Court of Appeals and by the Supreme Court. If such action is not taken the discontent already existing in railroad service will be enormously increased.